No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

TEXAS INDUSTRIES, INC.

Petitioner,

vs.

RADCLIFF MATERIALS, INC.,
JIMCO, INC., and OKC DREDGING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE, BORMAN'S, INC., A DELAWARE CORPORATION, IN SUPPORT OF PETITIONER

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I.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Borman's, Inc., operates a chain of retail pharmacies in Michigan. Borman's is one of three defendants in an antitrust action in the United States District Court for the

Eastern District of Michigan[1] In that litigation Borman's is accused of violating the antitrust laws merely because it is a participating provider in the Michigan Blue Cross and Blue Shield Prescription Drug Benefit Program. Although approximately 2000 pharmacies are participating providers, Borman's is one of only two providers who were named as defendants in the United States District Court action. Borman's operates the third largest pharmacy chain in Michigan. The two largest chains were not made defendants in the litigation.

Borman's has asserted a claim for contribution against a class of all participating providers in the Michigan Blue Cross and Blue Shield Prescription Drug Benefit Program who were not named as defendants. Borman's submits this Brief in support of Petitioner to bring to the Court's attention the urgent need for a right of contribution in antitrust cases in the health care industry. Borman's submits that justice may only be done by providing a right of contribution.

II.

SUMMARY OF ARGUMENT

Borman's is one of approximately 2,000 operators of retail pharmacies in Michigan who signed participation agreements with Blue Cross and Blue Shield of Michigan, Michigan's largest provider of health insurance. The provider agreements, which were neither drafted nor conceived by Borman's, require participating pharmacies to offer prescription drugs to Blue Cross subscribers in return for specified payments. Non-participating pharmacies receive no direct reimbursement from Blue Cross and Blue Shield of Michigan for prescription drugs sold to Blue Cross subscribers.

In 1978, a group of non-participating pharmacies sued Blue Cross and Blue Shield of Michigan and two retail pharmacy operators, including Borman's. *The actions of all retail*

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[1] *Pharmacists Guild of Michigan, et al.* v. *Blue Cross and Blue Shield of Michigan, et al* (E. D. Mich. Civil Action No. 8-70149).

pharmacies participating in the Prescription Drug Benefit Program are identical. Each retail pharmacy merely reviewed the proffered provider agreement and determined whether or not to execute it and abide by its terms. If in fact such provider agreements are determined to violate the antitrust laws, Borman's, absent a right of contribution, will be forced to bear a disproportionately large share of the total damages for reasons having no relation to its culpability. Rather, Borman's will be required to bear more than its fair share of the damage by reason of its fortuitous selection as a target defendant. The interests of justice require that if the Prescription Drug Benefit Program, and similar health care programs across the country, violate the antitrust laws, then no single participating health care provider should be required to bear the entire financial burden of the illegality. Without a right of contribution in such cases, competition may well be hindered because of the ability of competitors to select a competing defendant for financial ruin.

III.

ARGUMENT

Borman's brings to the attention of the Court a problem lurking but not raised in *Group Life and Health Insurance Co.* v. *Royal Drug Co.,* 440 U.S. 205, 99 S. Ct. 1067, 59 L.Ed. 2d 261 (1979). In *Royal Drug,* this Court ruled that a prescription drug benefit program sponsored by Texas Blue Shield was not the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), 59 Stat. 34. The Court pointedly did not consider (1) whether the prescription drug provider agreements were illegal under the antitrust laws, *Group Life and Health Insurance Co.* v. *Royal Drug Co., supra,* at 210, or, (2) the question presently before the Court, whether, if the agreements were illegal, the provider defendants have a right of contribution against the participating pharmacies who were not named defendants, but who had signed exactly the same agreements. Borman's submits that justice requires that retail pharmacies who are participating providers in a prescription drug benefit program sponsored by a state Blue Cross and Blue Shield association should have a right of contribution against all other participating pharmacies.

The Prescription Drug Benefit Program of which Borman's is a participant is almost identical to that described in *Group Life and Health Insurance Co.* v. *Royal Drug Co., supra,* at 209. In the case in which Borman's is a defendant, plaintiffs, an organization of pharmacies, alleged price fixing and group boycott because of a series of individual participation agreements by which Michigan Blue Cross assures its insureds that they can receive pharmaceutical drugs upon payment of a small sum which is only a portion of the cost of the prescription drug. The remainder of the cost is paid directly to the participating pharmacy by Blue Cross. If, on the other hand, the insured purchases prescription drugs from a non-participating pharmacy, the insured is required to pay the full price charged by that pharmacy and seek reimbursement himself for a portion of

that cost from Blue Cross. The out-of-pocket cost for prescription drugs for an insured is higher if the insured purchases prescription drugs from a non-participating pharmacy.

The Michigan program was developed by Blue Cross to fulfill one of the conditions of the collective bargaining agreements between the United Auto Workers and the major automobile manufacturers. Blue Cross offered to enter into a participation agreement with each licensed pharmacy in the State of Michigan. Contracts were offered to individual retail pharmacies, who had the option of signing or rejecting the agreements. All contracts are identical in form and no retail pharmacy was allowed to negotiate differing terms with Blue Cross.

Whether a right of contribution among joint antitrust tortfeasors ought to exist, assuming antitrust liability, must be analyzed in the context of the particular type of market which exists in the health care industry.[2] Health care is an atypical sector of our economy. Demand for prescription drugs is controlled not by the consumer, but by his or her licensed physician. Registered pharmacists, who control the dispensation of prescription drugs, are prohibited by law from selling drugs without the order of a licensed physician. A significant amount of the payment for prescription drugs originates not with the consumer, but with his or her health insurer. Thus, the classic pattern of barter between a merchant and the consumer is absent. Between the retailer and the consumer stands the consumer's insurer and his or her physician. It is these two entities which determine the demand side of the economic equation.

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[2] The United States of America, acting as amicus curiae in *Group Life and Health Insurance Co.* v. *Royal Drug Co., supra,* at n. 5, has taken the position that the prescription drug benefit program probably does not violate the antitrust laws. Amicus agrees with this conclusion, but is nevertheless faced with being targeted as a defendant in a case, with the potential of ruinous damages being awarded against it, when it has engaged in no conduct different than any of the other pharmacies who signed identical contracts.

There has been tremendous national pressure over the last decade to slow the rate of inflation of health care costs. One of the purposes of the prescription drug benefit program in Michigan is to meet that goal. The Michigan program provides that Blue Cross will reimburse a providing pharmacy for its "acquisition cost", as that is determined by a Blue Cross study of prevailing costs. By not entering into cost-plus contracts, Blue Cross places some restraint on the amount of its expenditures for prescription drugs, and thus limits its increases in premiums. Any consideration of the impact of the antitrust laws on this and similar programs must take into account both the unusual nature of the health care economy and the impact such a decision will have on the important national goal of cost containment.

The way in which the prescription drug benefit program works guarantees that the participating retail pharmacies can, at most, be no more than passive antitrust tortfeasors. The program is not conceived, formulated or directed by the retail pharmacies. It is offered to all licensed pharmacies on an equal basis. *If the program is unlawful, no participating retail pharmacy is any more culpable than any other.* These facts distinguish this type of case from a classic price fixing scheme in which a few self selected competitors meet to determine prices. See, e.g., *United States* v. *Trenton Potteries Company,* 273 U.S. 392, 47 S. Ct. 377, 71 L.Ed. 700 (1927).

It would therefore be unjust in the extreme to require one of many such passive antitrust tortfeasors to bear the entire burden of the loss merely by reason of its fortuitous selection as a target defendant.

Moreover, the Court must consider the anticompetitive tendencies of a rule denying contribution in these cases. The litigation in which Borman's is involved was brought by its competitors. If successful, the litigation will result in higher prescription drug costs in Michigan (and thus higher health insurance premiums for those with prescription drug benefits),

a weakening of limits on the rapid escalation of prescription drug costs, and the imposition of a colossal judgment on one of many retail pharmacies for reasons having nothing to do with its culpability. Without a right of contribution, which would permit the loss to be spread among all participating pharmacies who are equally, though passively, responsible for any harm done to plaintiffs, a group of competitors would be able to saddle another competitor with large judgment costs for anti-competitive rather than pro-competitive purposes. Clearly, in such a case, it is the consumer who suffers from the diminution of competition.

Borman's does not suggest that if its participation in the Prescription Drug Benefit Program violates the antitrust laws it should escape liability. Quite the contrary. Rather, Borman's believes that because of the particular nature of the health care system and its own passive role in the Prescription Drug Benefit Program, it would be unjust to require it to pay more than its fair share. If anything, contribution will increase the likelihood of effectuating the deterrent purposes of the treble-damage rule because health care providers and retailers will be unlikely to gamble that they will completely escape liability if their contemplated action violates the antitrust laws.

IV.

CONCLUSION

Borman's submits that a right of contribution is necessary in antitrust cases to insure that in the event programs such as the Michigan Prescription Drug Benefit Program are found to be in violation of the antitrust laws, no single passive tortfeasor will be required to bear more than its fair share of liability to harmed plaintiffs. The decision of the court below should be reversed. At a minimum, the Court should not impose a *per se* ban on contribution, but should adopt a flexible rule, allowing for contribution, at least in those circumstances, as here, where no intentional conduct is involved.

Respectfully submitted,

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